No. 92-1372

In The

Supreme Court of the United States

October Term, 1992

DEXTER ELLERBEE,

Petitioner,

vs.

DEXTER MILLS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Course of the Proceedings Below

As the result of an unfavorable teacher evaluation given to the Petitioner, Dexter Ellerbee (hereinafter referred to as "Petitioner") by the Respondent, Dexter Mills (hereinafter referred to as "Respondent") in 1987, Petitioner began publishing false and

defamatory statements and allegations against the Respondent which injured Respondent in the performance of his trade, office and professional duties as principal of North Cobb High School in Kennesaw, Georgia (Dmg. R. 3-8; Dmg.Tr. 89).[1] After Petitioner ignored demands by the Respondent and his attorney to cease and desist from further publication of such false allegations, Respondent initiated suit against Petitioner for damages arising out of these defamatory statements (Dmg. R. 3-8). Petitioner answered the Complaint admitting he made the statements, but contended they were protected by the First Amendment of the Constitution of the United States and by the Constitution of the State of Georgia (Dmg. R. 9-16).

Although the case was originally filed in January of 1989 in the State Court of Cobb County, it was subsequently transferred to the Cobb County Superior Court. The case came on for trial before a jury on May 20, 1991 and after having duly tried the issues, the jury returned a verdict on May 24, 1991. Initially, the jury returned a verdict in favor of Respondent for zero ($0.00) dollars in nominal damages, zero ($0.00) dollars in compensatory damages, Twenty Six Thousand Nine Hundred and Twenty ($26,920.00) Dollars for punitive damages and Twenty-Six Thousand Nine Hundred and Twenty ($26,920.00) for attorney fees, with costs to be taxed against the Petitioner (Dmg.Tr. 1120). Thereafter, on suggestion by Petitioner's counsel and consent of all parties, the court issued a curative instruction to the jury informing them that if they found the Respondent did not suffer any compensatory or nominal damages, he then could not recover punitive damages (Dmg.Tr. 1120-1126). After receiving this instruction, the jury returned a

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1. As this Court may not be aware, there are two (2) indexes for the two (2) appeals from the original state court Judgment. One index is from the injunction and one is from the damages action. For clarification purposes, Respondent will refer to the record for the injunction as "Inj. R." and for the damages action as "Dmg. R.". Similarly, as there are two (2) transcripts, all references to the trial transcripts will be as "Inj.Tr." for the injunction and "Dmg.Tr." for the trial.

verdict in favor of Respondent for One ($1.00) Dollar in nominal damages, One ($1.00) Dollar in compensatory damages, Twenty Six Thousand Nine Hundred and Twenty ($26,920.00) Dollars for punitive damages and Twenty-Six Thousand Nine Hundred and Twenty ($26,920.00) for attorney fees (Dmg.Tr. 1127). The trial court entered a Judgment on this verdict on May 29, 1991.[2]

In the original Complaint, Respondent requested a Permanent Injunction be entered against Petitioner to prohibit him from further engaging in slanderous conduct against Respondent (Dmg.R. 3-8). On July 1, 1991, the trial court held a hearing on this request and after oral argument was presented by both sides, the trial court granted Respondent a Permanent Injunction barring Petitioner from making certain enumerated statements (Inj.R. 41-58).[3] The Supreme Court of Georgia, however, upon review, found that the Injunction was drawn too broadly to be enforceable and thus, it was overturned (Pet. App. 4).

On or about July 1, 1991, Petitioner filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and same was denied by the Superior Court on November 7, 1991 (Dmg. R. 78-79; *see also*, Pet. App. 106).

The Petitioner appealed the denial of the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial to the Supreme Court of Georgia. After oral argument and careful review of the entire record, the Supreme Court of Georgia entered a decision on November 16, 1992 unanimously affirming the trial court's entry of Judgment in favor of the Respondent as to

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2. *See* Petitioner's ("Pet. App.") at 104 for the Judgment of the Superior Court of Cobb County entered on May 30, 1991.

3. The Superior Court of Cobb County barred the Petitioner from making twenty-seven (27) enumerated statements.

damages, but reversing the injunctive relief (Pet. App. 1-11).[4] In so concluding, the Supreme Court held a public school principal is not a public official for purposes of defamation actions and that under the specific facts of this case, Respondent did not meet the definition of a public figure as set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S. Ct. 2997 (Pet. App. 1-4).

Justice Fletcher specially concurred in the opinion, but stated he felt a public school principal is a public official under defamation law (Pet. App. 5). However, after closely reviewing the record, Justice Fletcher found that the Respondent had presented and that the jury had found, "clear and convincing evidence" that Petitioner had acted with "actual malice" in the making and publication of his false, defamatory statements against the Respondent (Pet. App. 10). Accordingly, Justice Fletcher concurred in the court's affirmation of the Judgment based on the jury's verdict for damages and attorneys' fees.[5]

B. Statement of Facts

Respondent was at all times material to this action, Principal of North Cobb High School (Dmg.Tr. 444). Petitioner is a former school teacher at North Cobb High School who last taught at the school in 1987 (Dmg.Tr. 89, 485-486). Petitioner is presently not an employee of the Cobb County School System and was not an employee of the Cobb County School System during the trial of this case.

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4. The Supreme Court of Georgia ruled the injunction swept more broadly than necessary.

5. As set forth in *Bose Corp. v. Consumer's Union*, 466 U.S. 485, 511, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), Justice Fletcher concluded because of the constitutional requirement of independent appellate review, the Supreme Court may affirm the jury award if Respondent has proved "actual malice" by clear and convincing evidence.

During 1987 while Petitioner was a teacher at North Cobb High School, he received an unfavorable teacher evaluation by Respondent (Dmg.Tr. 474-478). Said evaluation was performed by Respondent in his capacity as Principal of North Cobb High School. *Id.* Respondent subsequently developed an intervention plan for Petitioner in an effort to address certain performance concerns raised in the unfavorable performance evaluation. *Id.* Petitioner refused to perform said intervention plan and eventually requested and received a transfer from North Cobb High School (Dmg.Tr. 89, 485). A few months later Petitioner terminated his employment with Cobb County School System.

After leaving North Cobb High School during the spring of 1988, Petitioner began making allegations against Respondent implicitly or expressly suggesting that Respondent was engaged in unethical, immoral, fraudulent, threatening, harassing, terroristic and other inappropriate actions and conduct in the performance of his duties as Principal and Administrator of North Cobb High School (Dmg.Tr. 48-185). Petitioner used numerous mediums in order to broadcast and publish his allegations against Respondent. *Id.* By his own admission, Petitioner prepared numerous memorandums and letters which he mailed out containing the allegations against Respondent (*see* Respondent's Exhibits 1-10, Dmg.Tr. 55-76). Although all of these documents containing allegations against Respondent were prepared by Petitioner many of the documents were mailed out as if they were generated by teachers, parents, students, or organizations referred to by the Petitioner as "Citizens for a Better North Cobb" and the "North Cobb High School Improvement Association" (Respondent's Exhibits 1-10, Dmg.Tr. 55-76). Petitioner's allegations against Respondent were published in numerous ways including the following:

(1) Mailing documents to Respondent's supervisors and administrators within the Cobb County Public School System (Dmg.Tr. 54, 69, 70, 75, 76, 87);

(2) Mailing the documents to the individual board members on the Cobb County Board of Education (Dmg. Tr. 54, 69, 70, 87);

(3) Mailing the documents to teachers and employees serving under Respondent's supervision at North Cobb High School (Dmg.Tr. 55, 75, 76, 489, 490);

(4) Mailing the documents to colleagues and peers of Respondent (Dmg.Tr. 54, 55, 69, 70, 87, 111);

(5) Mailing the documents to various elected public officials including state legislators and county commissioners (Dmg.Tr. 54, 69, 70, 87, 111, 524);

(6) Mailing the documents to former employees and teachers serving under Respondent's administration (Dmg.Tr. 111);

(7) Mailing the documents to the State Board of Education officials (Dmg.Tr. 86, 111);

(8) Mailing the documents to various state investigators calling for investigations (Dmg.Tr. 86, 87);

(9) Handing out documents to the general public (Dmg.Tr. 82, 90-93);

(10) Stating the allegations to the general public at six (6) public meetings which were advertised and held at a public facility near North Cobb High School (Dmg.Tr. 82-85);

(11) By purchasing eighteen (18) different newspaper advertisements in local newspapers (Dmg.Tr. 83-85, 88, 89, 122);

(12) By putting up signs and billboards along the roadways in the North Cobb High School Community (Dmg.Tr. 86, 120-122);

(13) By setting up a booth at the annual Pioneer Days Festival and Parade held annually within the City of Acworth in order to distribute documents containing the allegations and to converse with passerbys regarding the allegations (Dmg.Tr. 80-81);

(14) By preparing petitions containing the allegations and having the petitions distributed through a door-to-door campaign to residents in the North Cobb Community (Dmg.Tr. 41, 122-124);

(15) Petitioner repeated the allegations before the Cobb County Board of Education in four (4) or five (5) public hearings (Dmg.Tr. 141);

(16) Petitioner also repeated said allegations before the members of the Board of Education on five (5) or six (6) occasions during executive session (Dmg.Tr. 140).

The false allegations the Petitioner published against the Respondent are too numerous to list in this brief, but same are highlighted in Respondent's Exhibits 1-10 (Dmg.Tr. 55-76) and Exhibits 40-51 (Dmg.Tr. 83-85) admitted during the trial of this case. During the trial of this case the Petitioner admitted that he had no personal knowledge as to whether many of the allegations he made were true or false and further admitted conduct demonstrating a callous disregard for whether or not said statements were true or false. Several examples of these types of statements which the Petitioner admitted making during the trial of this case include the following:

1. Petitioner stated in Respondent's Exhibit 5, that "teachers" wanted intervention plans declared null and void, but later admitted no teacher ever gave him such proposal (Dmg.Tr. 162);

2. Petitioner stated in one teacher proposal that teachers wanted "all derogatory information" removed from "their personnel file", but later admitted no teacher ever offered him such a proposal (Dmg.Tr. 65-67, 105-108, 162);

3. Petitioner suggested in his "teacher proposals" that Respondent should be reprimanded for fraudulent actions, but later admitted no one to his knowledge ever accused Respondent of committing fraudulent acts (Dmg.Tr. 43, 59, 105-108, 132, 163);

4. Petitioner stated "threatening tactics were being used by the Mills administration", but later admitted he didn't recall anyone specifically providing this information to him (Dmg.Tr. 163-165);

5. Petitioner states Respondent has done more harm to more people than any other administrator, yet cannot recall anyone who told him this (Dmg.Tr. 168, 169);

6. Petitioner stated "most [intervention] plans were designed for ulterior motives" yet he admitted he does not even know how many intervention or remediation plans have been prepared by the Mills administration (Dmg.Tr. 169, 170). Petitioner later admits he did not really know whether most remediation plans were in fact prepared for ulterior motives as he previously stated (Dmg.Tr. 169-174);

7. Petitioner stated that personnel files in most cases had been added to by the Mills administration for ulterior motives, but later conceded he didn't know whether in fact such statement was true (Dmg.Tr. 175, 176);

8. Petitioner stated Respondent had ruined the lives and careers of many teachers, but later admitted he cannot name a single teacher who told him this (Dmg.Tr. 113-114, 724-728);

9. Petitioner stated the Mills administration was engaged in the practice of awarding money to students for attendance, but later admitted he did not know this to be true and no one ever told him this was going on (Dmg.Tr. 178, 179,184);

10. Petitioner admits stating in his "teacher proposals" that Respondent imposed a "reign of terror" on the teachers at North Cobb High School, but failed to offer any evidence to support this allegation and admits said allegation was not actually proposed by any teacher (Dmg.Tr. 105-108);

11. Petitioner stated that teachers supporting him wanted a written reprimand placed in Mills' personnel file for "fraudulent actions"; but later admitted no one specifically told him this (Dmg.Tr. 43, 59, 132, 163);

12. Petitioner stated that "scholastic abuses" were going on during the Mills administration, but later admitted no one ever told him that (Dmg.Tr. 145);

13. Petitioner stated in his "public proposals" that students were "intentionally" made to feel unwelcome and unimportant by the Mills' administration, but later admitted the words "intentionally made to feel unimportant" were not words given to him by other persons, but were his own words put forward as a public proposal (Dmg.Tr. 147, 148);

14. Petitioner stated in his "public proposals" that students had been "encouraged to quit school" by the Mills administration, but later stated he could not recall the names of any students encouraged to quit (Dmg.Tr. 148-150);

15. Petitioner submitted a public proposal and accusation that under the Mills administration the "practice of receiving graft is prevalent", but later admitted the term "graft" was his term and he could not recall anyone saying that (Dmg.Tr. 152, 154);

16. Petitioner once made the statement that under the Mills administration students were caught fornicating or having sexual intercourse at school and were not punished for it, but later when asked where this information came from, Petitioner could not

recall the name of the individual who provided him with this information (Dmg.Tr. 155-159);

17. Petitioner admits stating in some of his public proposals that "many students have indicated sighting drugs and that drugs typically pass hands. The same students claim substances exchange hands virtually in front of teachers as well as administrators", although Petitioner could not recall the names of any students who called to report this allegation to him (Dmg.Tr. 160-162);

18. One of the Petitioner's public proposals indicated that the Mills administration was harassing and intimidating students by threatening "their grades and activities" (Dmg.Tr. 146-147). However, Petitioner admits he cannot recall the name of a single student who told him of this allegation (Dmg. Tr. 147);

19. Petitioner stated that "many students are favored over others due to affluence. Political clout or money should not influence participation." However, when questioned regarding this allegation against the Respondent, the Petitioner could not provide the name of a single student who was favored because of their affluence or the affluence of their parents (Dmg.Tr. 152-155);

20. Petitioner criticized Respondent for hiring homosexuals at North Cobb High School, but later admitted that he really did not know whether the subject teachers were homosexuals and did not know whether the Respondent had ever heard an alleged rumor that the subject teachers were homosexuals (Dmg.Tr. 159-160);

21. Petitioner stated in one of his public proposals that the Respondent and his administration needed to be moral examples, implying that they were not moral examples (Dmg.Tr. 165-166). However, when Petitioner was asked to give the grounds for his allegation that the Respondent was immoral, he indicated that one

example of his immorality was that "someone told you they heard somebody in the administration office use the word 'damn' on one occasion" (Dmg.Tr. 166-167);

22. Petitioner stated that Respondent "has done more harm to more people than any other administrator" but later admitted that he could not recall anyone ever making this statement to him (Dmg.Tr. 168-169);

During his testimony the Petitioner conceded that part of his motivation for pursuing his crusade against the Respondent was because of the unfavorable performance evaluation he received from the Respondent (Dmg.Tr. 127, 128). Moreover, the Petitioner acknowledged that he wanted to "strike back" at the Respondent (Respondent's Exhibit 2, Dmg.Tr. 59, 129).

The testimony of the numerous witnesses called during the trial of this case including the witnesses called by the Petitioner overwhelmingly established the falsity of the foregoing criticisms and allegations of wrongdoing. Additionally, not only were these statements regarding the Respondent false, but as found by the jury and Judge Fletcher in his concurrence, were made by Petitioner with the knowledge of their falsity or reckless disregard for their truth. (Pet. App. 10).

REASONS FOR DENYING THE WRIT

I.

UNDER THE UNAMBIGUOUS AND UNCONTROVERTED SET OF FACTS PRESENTED IN THIS ACTION, THE SUPREME COURT OF GEORGIA HAS CORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH DOES NOT NEED TO BE REVIEWED BY THIS COURT.

A. Respondent is not a "public official" and need not demonstrate the petitioner's false statements were published with actual malice.

As found by the Cobb County Superior Court and the Georgia Supreme Court, Respondent contends in his capacity as a high school principal, that he is not, and should not be characterized for defamation purposes, as a "public official" within the meaning of this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 S. Ct. 710 (1964). The Respondent further contends that the set of facts found by the jury to exist and here before the United States Supreme Court, evidence such a willful and wanton disregard by the Petitioner for the truth and defamatory nature of his statements made against the Respondent, that this case is not proper for review. Although there exists a split of authority among appellate courts as to whether a principal should be characterized as a "public official" within the definition set forth in *New York Times*, *supra,* this case does not factually present the proper circumstances upon which this Court should pass final judgment on such a crucial issue. As will be more fully discussed below, the Petitioner's defamatory statements regarding Respondent were found to be made by judge and jury with "actual malice". Therefore, any potential mistake as to Respondent's characterization as a "public official" is moot. Consequently, the decision of the Supreme Court of Georgia should not be disturbed.

The operative test for determining whether or not a defamatory plaintiff is or is not a public official is set forth in *New York Times, supra, Gertz v. Robert Welch, Inc., supra,* and *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669 (1966). A public official is described as one who: (a) holds public office; (b) holds governmental office; *New York Times, supra;* (c) enjoys greater access to channels of effective communication, *i.e.*, electronic and printed media; *Gertz, supra*; (d) has substantial responsibility for or control over the conduct of governmental affairs; *Rosenblatt, supra*; (e) holds position in government with such apparent importance that public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees; *Rosenblatt, supra.*

As noted in the opinion of the Georgia Supreme Court, the United States Supreme Court in *New York Times*, declined "to determine how far down into the lower ranks of government employees the 'public official' designation would extend." (Pet. App. 2). The court further noted the category clearly did not "include all public employees" as set forth in *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675 (1979), but rather, that the "public official" designation applied to those persons among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs (Pet. App. 2 quoting *Rosenblatt v. Baer, supra,* at 85, 86). The governance or control which a public school principal might be found to exercise over the conduct of government is at most remote and philosophical so as not to render a principal a public official thereby subjecting such an individual to the rigorous standards in *New York Times* and *Rosenblatt*.[6]

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6. If Respondent had been determined to be a "public official" under the definition set forth in *New York Times*, he would have had to have proven the defamatory statements made by Petitioner were made with "actual malice". (Cont'd)

In essence, the Petitioner asserts in his brief that because Respondent was a public employee and a member of numerous organizations around the state, he must be considered a "public official" for purposes of this action. If the court were to accept this assertion, any public employee who is active in his or her community would be considered a public official.[7] This assertion of Petitioner was not the intent of the Supreme Court in *New York Times* and its progeny.

As the Supreme Court of Georgia noted in its decision, implicit in the reasoning of *New York Times* is the concept that the people should be free to question and criticize only those who "govern" them.[8] In the present dispute, Respondent has no place in the hierarchy of government employees who have control over the conduct of governmental affairs. Respondent does not hold public or governmental office, nor does he enjoy greater access to the channels of effective communication as a result thereof. It is the Respondent's contention, and the view of the Georgia Supreme Court, that a principal simply does not have the relationship with government to warrant "public official" status under *New York*

(Cont'd)

Actual malice has been defined as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

7. In this regard, as previously noted, the United States Supreme Court has held the status of a public official ". . . cannot be thought to include all public employees." *Hutchinson v. Proxmire*, 443 U.S. at 119 n. 8.

8. The court in *McCutcheon v. Moran*, 99 Ill. App. 3rd 421, 425 N. E. 2d 1130, 1133 (1981) held that "the relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation."

Times.[9] Therefore, under the standard set forth hereinabove, Respondent was correctly determined not to be a "public official".

For clarification, it is also important to note, the Georgia Supreme Court held without explanation, that Respondent was not a public figure nor limited purpose public figure as defined by *Gertz, supra*.[10]

B. Even in light of the conflicting appellate decisions regarding whether a principal is a public official, this Court should decline to review the judgment of the Georgia Supreme Court as any error in this regard is harmless since the Petitioner's statements were made with "actual malice".

As Petitioner states in his brief, five (5) appellate courts, including the Georgia Supreme Court, have considered the issue of whether a principal is a public official. The Supreme Courts of Vermont and Mississippi and the Maryland Court of Appeals have all held that a principal is a public official, while the Supreme Court of Georgia and the Illinois Court of Appeals in *McCutcheon v. Morgan*, 99 Ill. App. 3rd 421, 425 N.E. 2d 1130 (1981) have held the public school principal is not a public official. As the Petitioner has adequately set forth those five (5) cases and each court's

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9. The opinion of the Georgia Supreme Court states "principals, in general, are removed from the general conduct of the government, and are not policy makers at the level intended by the *New York Times* designation of public official." (Pet. App. 3).

10. Pet. App. 3, 4. Because the Petitioner apparently concedes Respondent is not a public figure or limited purpose public figure under *Gertz*, since he does not argue differently in his brief, Respondent will not unnecessarily argue this point of law before the Court but will simply defer to the judgment of the Georgia Supreme Court and Respondent's previous contentions in the lower courts regarding this issue.

reasoning and additionally because as is discussed below, same is irrelevant to this Court's determination, the Respondent will forego a discussion regarding these appellate decisions.

In the present action, the bottom line is that a proper set of facts and circumstances is not presented upon which the Supreme Court of the United States should decide whether a principal is a "public official" for defamation purposes. Since the court instructed the jury in the original trial of this action that they could only award punitive damages if they found the Petitioner acted with actual malice, the verdict necessarily demonstrates a finding of actual malice on the part of the Petitioner. At the conclusion of the trial the court instructed the jury:

> I charge you that the speech and the statements complained of by the Plaintiff are of a public concern. Therefore, in order for the Plaintiff to be entitled to an award of punitive damages, he must demonstrate that the statements complained of were made with actual malice, as I will define that for you. Reckless disregard of the truth is equivalent to malice. I charge you that a statement is made with actual malice as the term is used in this charge, if it is made with knowledge that is false or with reckless disregard of whether it is false or not. In order to establish recklessness, the Plaintiff must prove that the Defendant had a high degree of awareness of the probable falsity of the statements published. I charge you ladies and gentlemen, that ill will, hatred, or hostility or even spite do not necessarily constitute actual malice as I had described the term to you.

(Dmg.Tr. 1108, 1109).

Inherent in the jury verdict awarding Respondent attorney's fees and punitive damages is the fact that "actual malice" was proven. Accordingly, even if the Respondent were a public official or public figure authorizing a jury charge that the Respondent was only entitled to recover in a defamation action upon a showing that the Petitioner acted with actual malice, the failure to give such a charge was harmless as a matter of law in that the jury necessarily found such malice to exist.

Moreover, Justice Fletcher is his special concurrence to the Supreme Court of Georgia's decision, noted that after careful review of the record, Respondent presented "*clear and convincing*" evidence that Petitioner acted with "actual malice" in making his defamatory statements (Pet. App. 10) (emphasis added). Because such clear and convincing evidence was presented and found to exist by the jury, Justice Fletcher concurred with the affirmation of the jury verdict as to damages (Pet App. 10). Accordingly, the "public official" issue upon which the Petitioner bases his request that this Court review a lower court judgment is moot, since "actual malice" has already been found to exist, by judge and jury, and any potential error regarding the "public official" issue is harmless.

The Respondent does not contend the law is settled regarding whether a principal is a "public official" under *New York Times*, but concedes this issue is in dispute among the appellate courts. However, the instant action does not present the proper set of facts or circumstances upon which this Court should address the issue. Even if Respondent is found to be a public official by this Court, the ultimate outcome is still the same since actual malice was found to exist by both judge and jury. Therefore, the "public official" issue is moot in the case at bar.

II.

PETITIONER'S DEFAMATORY STATEMENTS REGARDING RESPONDENT MADE WITH "ACTUAL MALICE" CLEARLY RESULTED IN ACTUAL DAMAGES TO THE RESPONDENT AND ARE NOT PROTECTED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.[11]

Petitioner contends that sufficient evidence does not exist to support the jury's award of actual damages in the instant action.[12] The Petitioner submits that because Respondent did not seek medical treatment for his alleged injuries and because the Respondent continued in his employment with a higher salary as a principal within the Cobb County School System even after the Petitioner's crusade against him, that the Respondent failed to prove compensatory or nominal damages.

It is important to note the Georgia Court of Appeals has held, "the expression 'actual damages' is not necessarily limited to pecuniary loss, or loss of ability to earn money." *Fugua Television, Inc. v. Flemming*, 134 Ga. App. 731, 734 (1975). The court in *Fugua Television* further stated, "wounding a man's feelings is as much actual damages as breaking his limbs." *Id.*

Further, the Supreme Court of the United States has best set forth Respondent's position regarding actual damages in a defamation case in *Gertz v. Robert Welch, Inc.*, *supra*, when it states:

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11. "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." The Constitution of the United States, Amendment I.

12. The jury returned a verdict of $1 in compensatory damages and $1 in nominal damages.

> [A]ctual injury is not limited to out-of-pocket loss . . . the more customary types of actual harm inflicted by inflammatory falsehood, included impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering . . . there need be no evidence which assigns an actual dollar value to the injury.

Gertz, 418 U.S. at 394, 94 S. Ct. at 3012.

In the case at bar, Respondent testified that he had been personally humiliated, embarrassed and ridiculed as a result of the false allegations published by the Petitioner. The Respondent testified about the strain the Petitioner's crusade imposed upon him as a principal in trying to supervise a school and earn the respect of his students and their parents while the Petitioner was taking out newspaper ads and putting up signs along the roadways suggesting that the Respondent was immoral and unethical (Dmg. R. 525-532). The Respondent also recounted numerous instances where he was ridiculed as a result of the false allegations which the Petitioner was publishing against him. The fact that Respondent continues to be employed in his occupation even after the defamatory remarks and allegations were made, in no way infers that Respondent has failed to suffer actual damages.

Despite the Petitioner's assertions to the contrary, the Respondent most certainly suffered actual damages as a result of the defamatory statements made with actual malice. Unarguably, this type of speech is not protected by the First Amendment.

CONCLUSION

For the above and foregoing reasons, the Court should deny the Petition for a Writ of Certiorari as same does not present a proper set of facts requiring this Court's review.

Dated: March 16, 1992.

Respectfully submitted,

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